FILED
DEC 1 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1541

IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

PAUL D. CLEMENT*
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Department of Justice
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Counsel for Respondent

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Counsel for Petitioner

* *Counsel of Record*

PETITION FOR CERTIORARI FILED MAY 31, 2006
CERTIORARI GRANTED OCTOBER 27, 2006

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

EC Term of Years v. United States
Assigned to: Honorable Kathleen Cardone
Demand: $0
Case in other court: 5th Circuit, :05- -50068
Cause: 26:6532 IRS: Refund of Tax Penalty

Date Filed: 09/05/2003
Jury Demand: None
Nature of Suit: 870 Taxes
Jurisdiction: U.S. Government
Defendant

Plaintiff

EC Term of Years Trust represented by

Francis S. Ainsa
Ainsa Hutson, L.L.P.
5809 Acacia Circle
El Paso, TX 79912
(915) 845-5759
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Appendix A

V.

Defendant

United States of America represented by

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Appendix A

Date Filed	#	Docket Text
09/05/2003	1	Complaint for Refund of Federal Income Tax filed. Filing Fee: $150.00 Receipt # 345805 (Pages: 3) (jm) (Entered: 09/09/2003)
09/22/2003	7	Motion by United States to dismiss, and/or for summary judgment and brief in support thereof (jm) (Entered: 09/23/2003)
10/03/2003	10	Certificate of service by EC Term of Years trust of Response to Motion to dismiss and/or for summary judgment with brief in support (rc) (Entered: 10/03/2003)
10/09/2003	11	Response by EC Term of Years in opposition to motion to dismiss [7-1], and/or motion for summary judgment and brief in support thereof [7-2]am) (Entered: 10/09/2003)
10/09/2003	12	Reply by United States to response to motion to dismiss [7-1], and/or motion for summary

		judgment and brief in support thereof [7-2] am) (Entered: 10/09/2003)
04/23/2004	13	Order denying motion to dismiss [7-1], denying motion for summary judgment and brief in support thereof [7-2] to show cause (plaintiff) not later than 5/14/04 why action should not be dismissed signed by Judge Kathleen Cardone (dll) (Entered: 04/26/2004)
05/14/2004	14	Response and brief in support by EC Term of Years to scheduling to show cause (plaintiff) not later than 5/14/04 why action should not be dismissed [13-1] (aq) (Entered: 05/14/2004)
06/01/2004	15	Response by United States to response to Order to show cause and brief in support thereof [14-1] (aq) (Entered: 06/01/2004)
11/08/2004	16	Renewed Motion by United States to dismiss, and/or for summary judgment (dll) (Entered: 11/09/2004)

Appendix A

11/22/2004	17	Order dismissing Petition and denying as moot motion to dismiss [16-1], and denying as moot motion for summary judgment [16-2] signed by Judge Cardone (aq) (Entered: 11/23/2004)
11/30/2004	18	Judgment signed by Judge Kathleen Cardone (Pages: 1) (dll) (Entered: 2/01/2004)
12/17/2004	19	Notice of appeal by EC Term of Years Trust (aq) (Entered: 12/20/2004)
03/30/2006	20	Certified copy of judgment of USCA affirming appeal [19-1] (dag) (Entered: 04/06/2006)
11/08/2006	22	ORDER of USCA (certified copy) regarding Petition for a writ of Certiorari is granted; re 19 Notice of Appeal (aq,) (Entered: 11/09/2006)

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Court of Appeals Docket #: 05-50068 Filed: 1/7/05
Nsuit: 2870 Tax Suits: Taxes
EC Term of Years v. USA
Appeal from: Western District of Texas, El Paso

Lower court information:

District: 0542-3 : 3:03-CV-363
Ordering Judge: Kathleen Cardone, US District Judge
Date Filed: 9/5/03
Date order/judgment: **/**/**
Date NOA filed: 12/17/04

Fee status: Paid

Prior cases:
None
Current cases:
None

EC TERM OF YEARS TRUST

Plaintiff - Appellant

Francis Swinburne Ainsa, Jr
FAX 915-845-7800
915-845-5300
[COR LD NTC ret]
Ainsa Partners
5809 Acacia Circle
El Paso, TX 79912

Appendix B

v.

UNITED STATES OF AMERICA
Defendant - Appellee

Teresa T Milton
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202-514-2947
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[COR LD NTC gvt]
US Department of Justice
Tax Division
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Washington, DC 20530

Appendix B

EC TERM OF YEARS TRUST

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appendix B

1/7/05	Tax case from district court docketed. NOA filed by Appellant EC Term of Years. [05-50068] (trm)
2/17/05	Record on appeal filed. Vol(s) of Pleadings: 1. [05-50068] ROA ddl satisfied. (sep)
5/31/05	Appellant's Brief filed by Appellant EC Term of Years. Copies of Brief: 7 # of pages: 18 Date of COS: 5/27/05 Hand Delivered [Y/N]: N Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [5181753-1] [05-50068] A/Pet's Brief ddl satisfied. E/Res's Brief due on 6/30/05 for USA. Record Excerpts due on 6/13/05 for EC Term of Years. (tdb)
6/10/05	Record excerpts filed by Appellant EC Term of Years # of copies: 4 Sufficient [Y/N]: y. [05-50068] Record Excerpts ddl satisfied. (jca)
6/30/05	Appellee's Brief filed by Appellee USA. Copies of Brief: 7 # of pages: 44 Word count: 9240 Date of COS: 6/29/05 Hand Delivered [Y/N]: n Disk Provided [Y/N]: y Sufficient [Y/N]: y. [5214537-1] [05-50068] E/Res's Brief ddl satisfied. Reply Brief due on 7/14/05 for EC Term of Years. (rfp)
7/26/05	Reply brief filed by Appellant EC Term of Years. Copies of Brief: 7 of pages: 6 Date of COS: 7/25/05 Disk Provided [Y/N]: y Sufficient [Y/N]: y. [5240838-1] [05-50068] Reply Brief ddl satisfied. (rfp)

Appendix B

11/9/05	Oral argument heard. Case argued by Teresa T Milton for Appellee USA, Francis Swinburne Ainsa for Appellant EC Term of Years [05-50068] (sme)
1/3/06	Opinion filed. Issd in T form? y Mandate pull date is 2/24/06. [05-50068] (jma)
1/3/06	Judgment entered and filed. [05-50068] (jma)
2/17/06	Petition filed by Appellant EC Term of Years for rehearing. # of copies filed: 4 [5374949-1] Mandate pull date canceled. Date of COS: 2/16/06 Sufficient [Y/N]: Y [05-50068] (mcs)
3/2/06	COURT Order filed denying appellant's petition for rehearing [5374949-1] Mandate pull date is 3/9/06. Copies to all counsel. [05-50068] (lcb)
3/10/06	Mandate issued. Approved BOC Issued (Y/N)?: n [05-50068] Mandate pull date satisfied. (gmr)
6/7/06	Supreme Court notice that petition for certiorari was filed on 05/31/06 by Appellant EC Term of Years. Sup.ct. No.: 05-1541 [05-50068] (cav)
11/7/06	Supreme Court order received granting petition certiorari [5467396-1] by Appellant EC Term of Years on 10/27/06. [05-50068] (cav)
11/7/06	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Vols: 1. [05-50068] (mcs)

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS, EL PASO DIVISION FILED APRIL 23, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. EP-03-CA-363(KC)

EC TERM OF YEARS TRUST,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant.

ORDER

Defendant moves to dismiss, or in the alternative for summary judgment on, the present claims as barred by res judicata. For the reasons set forth herein, the motions to dismiss or in the alternative for summary judgment are **denied.** Plaintiff is further ordered to show cause not later than May 14, 2004 why the present complaint should not be dismissed for lack of subject matter jurisdiction.

I. BACKGROUND

On September 7, 2000, plaintiff, one of several trusts created by Elmer Cullers, Jr. and Dorothy Cullers, filed a

complaint alleging wrongful levy pursuant to 26 U.S.C. § 7426, for a tax lien filed in 1999 as an effort to collect a tax deficiency assessed against the Cullers for tax years 1981 through 1984. The Internal Revenue Service contended that the trusts were established by the Cullers for purposes of avoiding payment of federal income taxes and that the trusts were in fact the Cullers's alter egos. On October 5, 1999, plaintiff paid the Cullers's deficiency under protest and then sought to recoup amounts paid. In December 1999 and January 2000, plaintiff was notified that it still owed interest and penalties on the deficiency. On January 3, 2000, plaintiff demanded return of the deficiency taken under levy. *BSC Term of Years Trust v. United States,* 2000 WL 33155870, No. EP-00-CA-270-H, at *1 (W.D. Tex. Dec. 28, 2000).

Defendant moved to dismiss the complaint, arguing that a courtesy copy of the January 3, 2000 was incorrectly addressed and therefore plaintiffs did not notify defendant within the statute of limitations for a wrongful levy claim set forth in 26 U.S.C. § 6532(c). *Id* at *2. By order dated December 28, 2000, the Court noted that plaintiff's claim was brought under § 7426, *id,* and 28 U.S.C. § 1346(a)(1), *id.* at *2 n.1. The Court stated that "§ 7426 'affords the exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability," *id.* (quoting *Tex. Commerce Bank of Fort Worth, N.A. v. United States,* 896 F.2d 152, 156 (5th Cir. 1990)), and as such plaintiff "may not pursue a remedy under § 1346." *Id.* The Court concluded that plaintiff filed their suit almost one year after the date of the levy, *id.* at *2, and the claim was therefore barred by § 6532(c)(1), *id.* at *3, and the Court

was therefore without subject matter jurisdiction to resolve plaintiff's claim, *id.* at *1.

The present action involves a claim for refund brought pursuant to 26 U.S.C. § 6511 and alleges jurisdiction premised on 28 U.S.C. § 1346(a). Complaint ¶¶ 3,4. On September 6, 2001, plaintiff filed a claim for refund of the deficiency, which claim was denied. *Id.* ¶ 12. The claim undisputedly involves the same funds taken through the 1999 levy addressed in the prior action, *id.* ¶ 6.

II. ANALYSIS

Defendant moves to dismiss, or in the alternative for summary judgment on, the present claims claiming a prior order dismissing a wrongful levy claim is res judicata as to the present claim.

A. Standard

Defendant does not specify a specific basis for its motion to dismiss, thus this Court will specify the specific standard applicable to motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim as well as for a motion for summary judgment.

A case may be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) when a court lacks the statutory or constitutional power to adjudicate. *Home Builders Assoc' of Miss., Inc. v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998). In resolving such a motion, a court may refer to evidence

outside the pleadings. *Espinoza v. Mo. Pacific R. Co.*, 754 F.2d 1247, 1248 n.1 (5th Cir. 1985). When the jurisdictional issue is of a factual nature rather than facial, plaintiff must establish subject matter jurisdiction by a preponderance of the evidence. *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir. 1989).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is properly granted "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460 (5th Cir. 2003) (internal quotation marks omitted). The truth of material facts alleged in the complaint is assumed, *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999), and all allegations are viewed in a light most favorable to the plaintiff. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 276 (5th Cir. 2001).

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *S & W Enters., LLC v. Southtrust Bank*, 315 F.3d 533, 537 (5th Cir. 2003). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Anderson*, 477 U.S. at 251. The weight of evidence and the credibility of witnesses are not proper considerations in deciding a motion

for summary judgment as such concerns are exclusively for the jury. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

B. Analysis

The doctrine of res judicata, read in its broadest sense, includes two distinct preclusion concepts: claim preclusion, also referred to as res judicata, and issue preclusion, or collateral estoppel.[1] *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994). Four conditions must be established for claim preclusion: (1) the parties in a later action must be identical or in privity with the parties in a prior action, (2) a court of competent jurisdiction must render the judgment in the prior action, (3) the prior action must conclude with a final judgment on the merits and (4) both suits must involve the same claim or cause of action. *Id.* Once established, claim preclusion prohibits the assertion of "any claim or defense in the later action that was or could have been raised in support of or in opposition to the cause of action asserted in the prior action," or otherwise, "the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial." *Id.* (internal quotation marks omitted).

Plaintiff agrees, as it must, that the above constitutes the appropriate res judicata standard and argues only that

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1. The standard identified by defendant is one of claim preclusion rather than issue preclusion. Issue preclusion serves the interests of judicial economy by treating as final and conclusive specific issues of fact or law that were validly and necessarily determined between two parties through prior litigation. *Id.* at 311.

the Order dismissing the case on subject matter jurisdiction grounds does not constitute a final judgment on the merits. In so arguing, plaintiff refers to the proposition that "[d]ismissals for want of jurisdiction are not decisions on the merits, while those based on limitations are." *Nilsen v. City of Moss Point*, 701 F.2d 556, 561 (5th Cir. 1983). While such dismissals are "paradigms of non-merits adjudication," merely classifying an action, regardless of the merits as one on which a court may not speak, a statute of limitations determination "assumes or decides that the court could have spoken but refuses to do so beyond declaring the claim to be stale." *Id.* at 562. A time bar determination thereby "bars not only the stale claim asserted but any others, though themselves still timely, that are part of the same cause of action." *Id.*

Plaintiff thus seizes on the Court's characterization of the dismissal as premised on want of subject matter jurisdiction while defendant implicitly characterizes the dismissal as premised on a statute of limitations. While sovereign immunity, as addressed in the prior order, ultimately implicates subject matter jurisdiction to decide claims against the Government, courts have not hesitated to characterize the statute of limitations proscribing waivers of sovereign immunity as such[2]. *United States v. Land*, 213 F.3d

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2. The waiver of sovereign immunity "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms. . . . [A]lthough we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'" *United States v. Dalm*, 494 U.S. 596, 608 (1990).

830, 837 (5th Cir. 2000) (in addressing Tucker Act claim involving landowner and failure to bring action within applicable statute of limitations, "dismissals of . . . claims [on statute of limitations grounds] are . . . res judicata"); *Jackson v. Widnall,* 99 F.3d 710, 715 n.8 (5th Cir. 1998) (indicating that dismissal on statute of limitations ground is a judgment on the merits for res judicata purposes).

While the Court relied on the statute of limitations applicable to § 7426 in dismissing the action, the § 1346(a)(1) was also dismissed under that statute of limitations. The Court relied on *Texas Commerce Bank of Fort Worth, NA.,* 896 F.2d 152, in concluding that § 7426 afforded a third-party the exclusive remedy for § 1346(a)(1) and thereby merged the two claims into a single § 7426 claim for purposes of dismissal. While the District Court correctly recited the *Texas Commerce Bank of Fort Worth, N.A.* holding, the absolutism of the proposition set forth in the holding has been diminished to some degree by the Supreme Court decision in *United States v. Williams,* 514 U.S. 527 (1995). *Williams* was decided after the *Texas Commerce Bank of Fort Worth, NA.* decision but prior to the District Court's decision and addresses the possibility of § 1346(a)(1) claims by third-party plaintiffs outside the § 7426 statute of limitations. At a minimum, it cannot be said that the § 1346(a)(1) claim was decided on statute of limitations grounds as such a conclusion presupposes that § 1346 incorporates the § 7426 statute of limitations. This Court therefore cannot afford that portion of the District Court's order on the § 1346 claim more deference than that given a dismissal on subject matter jurisdiction. As such, the § 1346 claim would not be considered dismissed on the merits for res judicata purposes.

Appendix C

Notwithstanding plaintiff's concession as to the relevant elements for a res judicata determination, this Court would question the fourth element pertaining to the same claim or cause of action involved as well as the third element. "[T]he principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action." *Nilsen,* 701 F.2d at 559. "[O]ne who has a choice of more than one remedy for a given wrong . . . may not assert them serially, in successive actions, but must advance all at once on pain of bar." *Id.* at 560. "[A]ny inquiry as to the application of the doctrine of res judicata must go beyond the procedural vehicle utilized to a pragmatic assessment of whether or not the primary right and duty and delict or wrong are the same in each action." *Id.* at 561 (internal quotation marks omitted).

Two considerations cast doubt on whether the two causes of action would be deemed separate causes of action for purposes of res judicata. The Supreme Court in *Williams* distinguished between pre-deprivation and post-deprivation, with § 1346(a)(1) identified as post-deprivation relief and § 7426(a)(1) identified as affording pre-deprivation relief. *Williams,* 514 U.S. at 538. A claim for refund would logically be characterized as post-deprivation as one may not seek a refund on that which he or she has not yet paid to the Government. As such, the two procedures could, under the appropriate facts, be considered mutually exclusive, representing separate stages in a procedural continuum. Additionally, as the present action involves a civil action on a claim for refund, a plaintiff may not initiate such an action unless such plaintiff has exhausted administrative remedies in pursuing such refund. *Williams,* 514 U.S. at 527; 26 U.S.C. § 7422(a). Given the interaction of the nine-month statute of

limitations on a wrongful levy claim and the exhaustion requirements in refund claims, it does not necessarily follow that the two claims would be expected to arise contemporaneously. As such, a refund would require the additional fact of exhaustion and would not constitute "the same nucleus of operative facts as the prior complaint." *Jackson v. Widnall,* 99 F.3d 710, 715 n.8 (5th Cir. 1998).

The foregoing indicates only that res judicata is not an appropriate vehicle for dismissing the present complaint. The foregoing should not be read as a conclusion that plaintiff's claim is properly before this Court. "Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583 (1999). Suits against the Government, as involved in the present case, necessarily implicate principles of sovereign immunity. Sovereign immunity is jurisdictional in nature. *FDIC v. Meyer,* 510 U.S. 471, 475 (1994). "[T]he United States, as sovereign, is immune from suit, save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Dalm,* 494 U.S. at 608 (internal quotation marks omitted). Plaintiff must therefore demonstrate to the satisfaction of this Court that the present claim falls within an appropriate waiver of sovereign immunity and thus there is jurisdiction to hear the present claim.

It is without question that *Williams* adds a degree of complexity to what was originally a single standard applicable to all third-party claims involving levies. At present, this Court is inclined to conclude that the decision

of the Tenth Circuit Court of Appeals in *Dahn v. United States,* 127 F.3d 1249, 1253-54 (10th Cir. 1997), essentially holding that *Williams* should be limited to the exceptional facts presented therein, is applicable given the earlier precedent of the Fifth Circuit Court of Appeals while the application of *Williams* by the Ninth Circuit Court of Appeals in *WWSM Investors v. United States,* 64 F.3d 456 (9th Cir. 1995) (declining to limit *Williams* to its facts), sweeps too broadly. *Dahn* adheres to the exclusivity of wrongful levy actions to one in plaintiff's position while *WWSM Investors* calls such exclusivity further into doubt. The Tenth Circuit declined to extend Williams, noting the peculiar outcome of such an extension where "anyone claiming financial losses tied to the collection of someone else's taxes could arguably be . . . entitled to seek a 'refund'—perhaps long after the remedy specifically devised for the situation by Congress had expired." *Dahn,* 127 F.3d at 1254. This Court would similarly find it surprising that a party could sit on his or her rights, or in fact litigate a matter as a wrongful levy, then return with a subsequent civil action on a claim for a refund.

It is further noteworthy that the Supreme Court in *Williams* repeatedly refers to the plaintiff's circumstances through phrases like "people in Williams' position without a remedy," "to persons situated as Lori Williams is," "to someone in Williams' position" *Williams,* 514 U.S. at 536, "Williams and persons similarly situated," *id.* at 537, "people caught in Williams' bind," *id* at 538, and "permit[ting] persons in Williams' position to bring refund suits," *id.* at 540. The case further involved a lien rather than a levy, *id.*, and as such the two are different devices with different legal

effects.[3] *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244-45 (10th Cir. 1989). In light of the foregoing, this Court would likely conclude that a wrongful levy claim was plaintiff's sole remedy and it may not effectively get a second bite at the apple having missed the applicable statute of limitations on its wrongful levy claim.

Given the foregoing, this Court will not dismiss the present case without first affording plaintiff the opportunity to address the legal concerns raised above. It is therefore ORDERED that plaintiff shall show cause on or before May 14, 2004 why the present complaint should not be dismissed for lack of subject matter jurisdiction.

A failure of plaintiff to respond by said date shall be construed as a manifestation of consent to such dismissal. Defendant shall have ten days from the filing of such response to file its reply.

III. CONCLUSION

Defendant's motions to dismiss (Doc. No. 7-1) or in the alternative for summary judgment (Doc. No. 7-2) are **denied.** Plaintiff is ordered to show cause not later than May 14, 2004 why the present action should not be dismissed.

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3. It is further noted that amendments to the lien provisions of the Internal Revenue Code in 1998 may address the very factual scenario presented in *Williams*, thereby potentially further limiting the impact of the case under its own facts. 26 U.S.C. §§ 6325(b)(4), 7426(a)(4).

Appendix C

SO ORDERED.

Dated at El Paso, Texas, April 23, 2004.

s/ Kathleen Cardone
Kathleen Cardone
United States District Judge

APPENDIX D — COMPLAINT FOR REFUND OF FEDERAL INCOME TAX DATED AND FILED SEPTEMBER 5, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Cause No. EP03CA0363

EC Term of Years Trust,

Plaintiff,

v.

United States of America,

Defendant.

COMPLAINT FOR REFUND OF FEDERAL INCOME TAX

1. EC Term of Years Trust is a trust created under the laws of the State of Texas. Its principal place of business is in El Paso, El Paso County, Texas. It's [sic] Managing Trustee is also a resident of El Paso, El Paso County, Texas.

2. The Defendant is the United States of America. Pursuant to F.R.C.P. 4(i), service of process can be had by serving the summons and a copy of the complaint to the United States Attorney, Mr. Johnny K. Sutton, Attention Ms. Vernell Everett, 601 N.W. Loop 410, San Antonio, TX 78216; and by sending a copy of the complaint and summons to the Attorney General of the United States, Mr. John Ashcroft,

Appendix D

U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 4545, Washington, D.C. 20530-0001, and to the Internal Revenue Service, Stop 5021AUS, 300 E. 8th Street, Austin, TX 78701.

3. This is a suit arising under 26 U.S.C. 6511 for denial of a claim for refund filed by Plaintiff.

4. Jurisdiction is conferred upon this Court by virtue of Title 28, §1346(a) of the United States Code.

5. The Internal Revenue Service has never assessed any tax against the Plaintiff under Section 6901 of the Internal Revenue Code.

6. By Notice of Levy (Form 668A) dated September 10, 1999, a copy of which is attached hereto as Exhibit A and by this reference made a part hereof, the Internal Revenue Service levied against the account of Plaintiff for personal income taxes (Form 1040) for the years 1981 1982, 1983 and 1984, which amounts are claimed to be due and owing by Elmer W. Cullers, Jr. and Dorothy Cullers (the "Cullers") to the United States Government, pursuant to Internal Revenue Code.

7. Plaintiff was created prior to any assessment of taxes against the Cullers for the tax years shown on Exhibit A.

8. The account levied was owned by Plaintiff.

9. The Cullers do not have and have never had any ownership interest, legal or equitable, in Plaintiff's account.

10. The time period for assessing the tax against the Plaintiff for transferee liability had expired at the time the levy was made.

11. The levy against the Plaintiff is erroneous and illegal.

12. On September 6, 2001, Plaintiff filed a claim for a refund, a copy of which is attached as Exhibit B. Even though the claim for refund was proper and should have been paid, it was denied.

13. Plaintiff is the sole owner of this claim against the Defendant and has made no assignment of this claim.

WHEREFORE, Plaintiff prays for judgment against the Defendant in the amount of $3,389,426.37, together with legal fees, costs, and interest as provided by law, and for such other and further relief as the Court may deem appropriate.

DATED this 5th day of September, 2003.

Respectfully submitted,

AINSA HUTSON, LLP
5809 Acacia Circle
El Paso, Texas 79912
Telephone: (915) 845-5300
Facsimile: (915) 845-7800

By: s/ Francis S. Ainsa, Jr.
FRANCIS S. AINSA, JR.
Bar Card No. 00949000

(Rev. August 1998)

Notice [illegible]

DATE: SEPTEMBER 10, 19[illegible] DISTRICT: SOUTH TEXAS

TELEPHONE NUMBER OF IRS OFFICE:

REPLY TO: INTERNAL REVENUE SERVICE
700 E. SAN ANTONIO C101
STOP 5240ELP
EL PASO, TX 79901
ATTN: JOHN WOOD

(915) 534-6490

NAME AND ADDRESS OF TAXPAYER:
E C TERM OF YEARS TRUST, JOHN CU
TRUSTEE
AS NOMINEE, ALTER EGO AND/OR TRA
ELMER W. AND DOROTHY CULLERS
7170 WESTWIND 101
EL PASO, TX 79912

TO: CHASE BANK OF TEXAS, N.A.
201 E. MAIN
EL PASO, TX 79901

Acct. No.: 72061157129
IDENTIFYING NUMBER(S): [redacted]

THIS ISN'T A BILL FOR TAXES YOU OWE. THIS IS A NOTICE OF LEVY WE ARE USING TO COLLECT MONEY OWED BY THE TAXPAYER NAMED ABOVE.

Kind of Tax	Tax Period Ended	Unpaid Balance of Assessment	Statutory Additions	Total
1040	12/31/81	1,061,103.44	278,972.15	1,340,075.59
1040	12/31/82	974,214.79	280,251.80	1,254,466.59
1040	12/31/83	438,573.65	320,801.74	759,375.39
1040	12/31/84	26,378.94	9,129.86	35,508.80

THIS LEVY WON'T ATTACH FUNDS IN IRAs, SELF-EMPLOYED INDIVIDUALS' RETIREMENT PLANS, OR ANY OTHER RETIREMENT PLANS IN YOUR POSSESSION OR CONTROL, UNLESS IT IS SIGNED IN THE BLOCK TO THE RIGHT. →

Total Amount Due ▶ 3,389,426.37

We figured the interest and late payment penalty to SEPTEMBER 30, 1999

The Internal Revenue Code provides that there is a lien for the amount that is owed. Although we have given the n and demand required by the Code, the amount owed hasn't been paid. This levy requires you to turn over to us person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are alr obligated to pay this person. However, don't send us more than the "Total Amount Due."

Money in banks, credit unions, savings and loans, and similar institutions described in section 408(n) of Internal Revenue Code must be held for 21 calendar days from the day you receive this levy before you send us money. Include any interest the person earns during the 21 days. Turn over any other money, property, cre etc. that you have or are already obligated to pay the taxpayer, when you would have paid it if this person asked payment.

Make a reasonable effort to identify all property and rights to property belonging to this person. At a minimum, se your records using the taxpayer's name, address, and identifying numbers(s) shown on this form. Don't offset money person owes you without contacting us at the telephone number shown above for instructions. You may not subtra processing fee from the amount you send us.

Receipt Acknowledged:

To respond to this levy:

1. Make your check or money order payable to UNITED STATES TREASURY [illegible] Service.
2. Write the taxpayer's name, identifying number(s), kind of tax and tax period shown on this form, and "LEVY PROCEE on your check or money order (not on a detachable stub.).
3. Complete the back of Part 2 of this form and mail it to us with your payment in the enclosed envelope.
4. Keep Part 1 of this form for your records and give the taxpayer Part 3 within 2 days.

If you don't owe any money to the taxpayer, please complete the back of Part 2, and mail that part back to us in enclosed envelope.

Signature of Service Representative

Title
REVENUE OFFICER

Exhibit A

BEST AVAILABLE COPY

EXHIBIT B — LETTER FROM FRANCIS S. AINSA, JR. OF AINSA HUTSON, LLP TO DISTRICT DIRECTOR, INTERNATIONAL REVENUE SERVICE RE: CLAIM FOR REFUND DATED SEPTEMBER 6, 2001

AINSA HUTSON, LLP
Attorneys & Counselors

A Limited Liability Partnership
5809 Acacia Circle
El Paso, Texas 79912
Tel: (915) 845-5300
Fax: (915) 845-7800

Francis S. Ainsa, Jr.
Email: fain@acaciapark.com

September 6, 2001

District Director
Internal Revenue Service
300 E. 8th Street
Austin, TX 73301

Re: Claim for Refund

Dear Sir:

I represent the entity named in paragraph 1 below. I have attached a copy of a power of attorney from my client for your files.

1. This Claim for Refund is being made by EC Term of Years Trust, an entity created under the laws of the State of Texas (the "Claimant").

Exhibit B

2. This Claim for Refund is being made under 26 U.S.C. 6511 and any other federal statutes applicable to the facts set forth below.

3. This Claim is based upon the payment by Claimant of $3,489,426.37 to the Internal Revenue Service (the "IRS") pursuant to a Notice of Levy, dated September 10, 1999, a copy of which is attached as Exhibit A. The Notice of Levy was issued to collect personal income taxes (Form 1040), penalties and interest for the years 1981, 1982, 1983, and 1984 assessed against Elmer W. Cullers, Jr. [SSN redacted] and Dorothy Cullers (the "Cullers").

4. The IRS has treated Claimant as the nominee or alter ego of the Cullers as shown on the Notice of Levy. The IRS never assessed any tax against the Claimant. The time period for assessing the tax against the Claimants for transferee liability has expired.

5. During 1981, 1982, 1983 and 1984, the Cullers invested in Mid Continent Drilling Associates (the "Partnership"). In 1986, the IRS notified the Cullers that their deductions from losses in the Partnership were being disallowed. The Cullers, both through the Partnership and individually, contested the IRS's disallowance of their deductions. Ultimately, the United States Tax Court held that the Partnership was an abusive tax shelter and that deductions claimed by its partners would be disallowed. Subsequently, the IRS assessed taxes, penalties and interest against the Cullers. The fact that the Cullers owed taxes, penalties and interest is not disputed.

Exhibit B

6. The Claimant is a trust created by the Cullers under the laws of the State of Texas. The Claimant was organized under an estate plan created by the Cullers in 1991 to reduce the impact of federal estate taxes on their estates. In April 1991, the Cullers transferred a substantial portion of their property to Claimant for a term of years. Subsequently, the Cullers transferred their remainder interest in the property conveyed to Claimant in consideration of the payment of a monthly annuity. Even though Claimant was lawfully created solely for the purpose of reducing federal estate taxes on the Cullers estates, the IRS took the position that:

> (a) the transfer of property from Cullers to Claimant was done with actual intent to defraud the IRS and prevent it from collecting the taxes, penalties and interest previously assessed against the Cullers; and,
>
> (b) there was no consideration for the transfer of property by the Cullers to Claimant; and
>
> (c) the Cullers transferred a substantial portion of their property to Claimant to place such property beyond the reach of the IRS; and
>
> (d) Claimant was nothing more than the alter ego or nominee of the Cullers and should be disregarded; and,
>
> (e) the Cullers violated the Texas Uniform Fraudulent Transfer Act in making the transfer of property to Claimant such that the transfer to

Exhibit B

Claimant should be set aside and the property restored to the Cullers and thereby made available to satisfy the tax obligation owed by the Cullers.

7. The IRS filed a tax lien against Claimant in 1999, a copy of which is attached as Exhibit B.

8. In 1999, the IRS threatened to take all available legal action against Claimant to seize its property and sell it to pay the taxes, penalties and interest owed by the Cullers. In order to avoid disruption of its business affairs, Claimant requested that the IRS provide the total amount of taxes, penalties and interest owed by the Cullers. Claimant then deposited such amount, which equaled $3,389,426.37, in its account in Chase Bank of Texas, N.A., 201 E. Main, El Paso, Texas. The IRS then issued its Notice of Levy attached as Exhibit A and the amount levied was paid to the IRS on October 5, 1999 as shown by the check attached as Exhibit C.

9. On September 10, 1999, the Cullers did not have and never have had any ownership interest, legal or equitable, in Claimant's account at Chase Bank of Texas which was levied. Further, Claimant was not on September 10, 1999 and is not now the alter ego or nominee of the Cullers. The property transferred to Claimant was transferred for a good and valuable consideration without any intention to defraud the IRS, or prevent it from collecting taxes assessed against the Cullers and without being in violation of the Texas Uniform Fraudulent Transfer Act.

Exhibit B

10. Claimant is the sole owner of this claim and has made no assignment of this claim.

Claimant is requesting a refund of the amount of $3,389,426.37 which was paid to the Internal Revenue Service under the Notice of Levy attached as Exhibit A.

DATED this 6th day of September 2001.

Respectfully submitted,

AINSA HUTSON, LLP
5809 Acacia Circle
El Paso, Texas 79912
Telephone: (915) 845-5300
Facsimile: (915) 845-7800

By: s/ Francis S. Ainsa, Jr.
FRANCIS S. AINSA, JR.
Bar Card No. 00949000

cc: John Cullers, Trustee

(Rev. August 1990) NOTICE OF LEVY

DATE: SEPTEMBER 10, 19 DISTRICT: SOUTH TEXAS

TELEPHONE NUMBER OF IRS OFFICE:

(915) 534-6490

REPLY TO: INTERNAL REVENUE SERVICE
700 E. SAN ANTONIO C101
STOP 5240ELP
EL PASO, TX 79901
ATTN: JOHN WOOD

NAME AND ADDRESS OF TAXPAYER:
E C TERM OF YEARS TRUST, JOHN CU
TRUSTEE
AS NOMINEE, ALTER EGO AND/OR TRA
ELMER W. AND DOROTHY CULLERS
7170 WESTWIND 101
EL PASO, TX 79912

TO: CHASE BANK OF TEXAS, N.A.
201 E. MAIN
EL PASO, TX 79901

Acct. No.: 72061157129
IDENTIFYING NUMBER(S): [redacted]

THIS ISN'T A BILL FOR TAXES YOU OWE. THIS IS A NOTICE OF LEVY WE ARE USING TO COLLECT MONEY OWED BY THE TAXPAYER NAMED ABOVE.

Kind of Tax	Tax Period Ended	Unpaid Balance of Assessment	Statutory Additions	Total
1040	12/31/81	1,061,103.44	278,972.15	1,340,075.59
1040	12/31/82	974,214.79	280,251.80	1,254,466.59
1040	12/31/83	438,573.65	320,801.74	759,375.39
1040	12/31/84	26,378.94	9,129.86	35,508.80

THIS LEVY WON'T ATTACH FUNDS IN IRAs, SELF-EMPLOYED INDIVIDUALS' RETIREMENT PLANS, OR ANY OTHER RETIREMENT PLANS IN YOUR POSSESSION OR CONTROL, UNLESS IT IS SIGNED IN THE BLOCK TO THE RIGHT. → Total Amount Due ▶ 3,389,426.37

We figured the interest and late payment penalty to SEPTEMBER 30, 1999

The Internal Revenue Code provides that there is a lien for the amount that is owed. Although we have given the n and demand required by the Code, the amount owed hasn't been paid. This levy requires you to turn over to us person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are alr obligated to pay this person. However, don't send us more than the "Total Amount Due."

Money in banks, credit unions, savings and loans, and similar institutions described in section 408(n) of Internal Revenue Code must be held for 21 calendar days from the day you receive this levy before you send us money. Include any interest the person earns during the 21 days. Turn over any other money, property, cre etc. that you have or are already obligated to pay the taxpayer, when you would have paid it if this person asked payment.

Make a reasonable effort to identify all property and rights to property belonging to this person. At a minimum, se your records using the taxpayer's name, address, and identifying numbers(s) shown on this form. Don't offset money person owes you without contacting us at the telephone number shown above for instructions. You may not subtra processing fee from the amount you send us.

Receipt Acknowledged:

To respond to this levy:
1. Make your check or money order payable to UNITED STATES TREASURY
2. Write the taxpayer's name, identifying number(s), kind of tax and tax period shown on this form, and "LEVY PROCEE on your check or money order (not on a detachable stub.).
3. Complete the back of Part 2 of this form and mail it to us with your payment in the enclosed envelope.
4. Keep Part 1 of this form for your records and give the taxpayer Part 3 within 2 days.

If you don't owe any money to the taxpayer, please complete the back of Part 2, and mail that part back to us in enclosed envelope.

Signature of Service Representative | Title
REVENUE OFFICER

Exhibit A

20 COU[illegible] RECORDING DATA

INTERNAL REVENUE SERVICE ACSIMILE FEDERAL TAX LIEN DOCUMENT	Recording Number: UCC Number Liber Page
trict: SOUTH TEXAS	IRS Serial Number: 749957821

This Lien Has Been Filed in Accordance with
Internal Revenue Regulation 301.6323(f)-1.

of Taxpayer : TERM OF YEARS TRUST,JOHN CULLERS TRUSTEE,AS NOMINEE,ALTER; Nominee of EGO AND/OR TRANSFEREE OF ELMER W. CULLERS,JR.,AND DOROTHY CULLERS
dence : 007 WESTWIND . PASO, TX 79912-1729

th respect to each assessment below, unless notice of lien
refiled by the date in column(e), this notice shall constitute
e certificate of release of lien as defined in IRC 6325(a).

m	Period (b)	ID Number (c)	Assessed (d)	Refile Deadline (e)	Unpaid Balance (f)
0	12/31/1981	[redacted]	02/09/1993	03/11/2003	1060399.44
0	12/31/1982		02/09/1993	03/11/2003	974214.79
0	12/31/1983		05/09/1994	06/08/2004	438573.65
0	12/31/1984		05/09/1994	06/08/2004	26378.94

d at: Real Property El Paso County El Paso, TX 79900	Total	$ 2499566.82

notice was prepared and executed at Austin, TX
his, the 11th day of August, 1999.

orizing Official: JOHN A. WOOD (915) 534-6490	Title: Revenue Officer 74-01-2429

Exhibit B

CHASE BANK OF TEXAS
NATIONAL ASSOCIATION
EL PASO, TEXAS 79901
Member FDIC

CHASE

A 7200020156

DATE 10/05/1999

CASHIER'S CHECK

REMITTER EC TERM OF YEARS TRUST

PAY TO THE ORDER OF x-x-x-x-UNITED STATES TREASURY.-x-x-x- $3.369.426.37

CHASE DOWNTOWN

A 90 day waiting period and an indemnifying Bond is required to replace this check.

AUTHORIZED SIGNATURE

"7200020156" ⑆100115⑆ "0010999796"

CHASE BANK OF TEXAS, NATIONAL ASSOCIATION

CHASE

DEBIT

Date 10.5.99 Account BAC 7941

Prepared by [illegible] Phone # 915 546 2452

App. By [illegible] Phone # 1 915 546-6699

IMPORTANT: AMOUNT CANNOT BE GREATER THAN 99,999,999.99

EC Term of years trust

REASON	AMOUNT
Check to: United States Treasury	

CASHIERS CHECK 220
35 (PCS-OCT-99 10:40
FEE WAIVED

720611571129

ACCOUNT # 720611571129 ---|4---- $FLICA 3,369,426.37

Exhibit C

Form **2848**
(Rev. December 1997)
Department of the Treasury
Internal Revenue Service

Power of Attorney and Declaration of Representative

▶ See the separate instructions.

OMB No. 1545-0150

For IRS Use Only
Received by:
Name
Telephone
Function
Date / /

Part I Power of Attorney (Please type or print.)

1 Taxpayer Information (Taxpayer(s) must sign and date this form on page 2, line 9.)

Taxpayer name(s) and address	Social security number(s)	Employer identification number
E C Term of Years Trust 7170 Westwind, Ste. 101 El Paso, TX 79912		74 6387686
	Daytime telephone number 915-584-5600	Plan number (if applicable)

hereby appoint(s) the following representative(s) as attorney(s)-in-fact:

2 Representative(s) (Representative(s) must sign and date this form on page 2, Part II.)

Name and address	CAF No. / Telephone No. / Fax No. / Check if new: Address ☐ Telephone No. ☐
Francis S. Ainsa, Jr. 5809 Acacia Circle El Paso, TX 79912	915-845-5300 915-845-7800
Name and address	CAF No. Telephone No. Fax No. Check if new: Address ☐ Telephone No. ☐
Name and address	CAF No. Telephone No. Fax No. Check if new: Address ☐ Telephone No. ☐

to represent the taxpayer(s) before the Internal Revenue Service for the following tax matters:

3 Tax matters

Type of Tax (Income, Employment, Excise, etc.)	Tax Form Number (1040, 941, 720, etc.)	Year(s) or Period(s)
Income	Form 668-A(c) Notice of Levy	1999
	(Attached as Exhibit A)	

4 **Specific use not recorded on Centralized Authorization File (CAF).** If the power of attorney is for a specific use not recorded on CAF, check this box. (See instruction for Line 4—Specific uses not recorded on CAF.) . . . . . ▶ ☐

5 **Acts authorized.** The representatives are authorized to receive and inspect confidential tax information and to perform any and all acts that I (we) can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The authority does not include the power to receive refund checks (see line 6 below), the power to substitute another representative unless specifically added below, or the power to sign certain returns (see instruction for Line 5—Acts authorized).

List any specific additions or deletions to the acts otherwise authorized in this power of attorney:

Note: *In general, an unenrolled preparer of tax returns cannot sign any document for a taxpayer. See Revenue Procedure 81-38, printed as Pub. 470, for more information.*

Note: *The tax matters partner of a partnership is not permitted to authorize representatives to perform certain acts. See the instructions for more information.*

6 **Receipt of refund checks.** If you want to authorize a representative named on line 2 to receive, BUT NOT TO ENDORSE OR CASH, refund checks, initial here _____ and list the name of that representative below.

Name of representative to receive refund check(s) ▶

7 **Notices and communications.** Original notices and other written communications will be sent to you and a copy to the first representative listed on line 2 unless you check one or more of the boxes below.

a If you want the first representative listed on line 2 to receive the original, and yourself a copy, of such notices or communications, check this box . . . . . ▶ ☒

b If you also want the second representative listed to receive a copy of such notices and communications, check this box . . . . . ▶ ☐

c If you do not want any notices or communications sent to your representative(s), check this box . . . . . ▶ ☐

8 **Retention/revocation of prior power(s) of attorney.** The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same tax matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here. . . . . ▶ ☐
YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.

9 **Signature of taxpayer(s).** If a tax matter concerns a joint return, **both** husband and wife must sign if joint representation is requested, otherwise, see the instructions. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

▶ **IF NOT SIGNED AND DATED, THIS POWER OF ATTORNEY WILL BE RETURNED.**

E C Term of Years Trust

By: [signature]	7-17-01	Trustee
Signature	Date	Title (if applicable)

John S. Cullers, Trustee
Print Name

Signature	Date	Title (if applicable)

Print Name

Part II Declaration of Representative

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Treasury Department Circular No. 230 (31 CFR, Part 10), as amended, concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;
- I am authorized to represent the taxpayer(s) identified in Part I for the tax matter(s) specified there; and
- I am one of the following:
  - a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.
  - b Certified Public Accountant—duly qualified to practice as a certified public accountant in the jurisdiction shown below.
  - c Enrolled Agent—enrolled as an agent under the requirements of Treasury Department Circular No. 230.
  - d Officer—a bona fide officer of the taxpayer's organization.
  - e Full-Time Employee—a full-time employee of the taxpayer.
  - f Family Member—a member of the taxpayer's immediate family (i.e., spouse, parent, child, brother, or sister).
  - g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Service is limited by section 10.3(d)(1) of Treasury Department Circular No. 230).
  - h Unenrolled Return Preparer—an unenrolled return preparer under section 10.7(c)(viii) of Treasury Department Circular No. 230.

▶ **IF THIS DECLARATION OF REPRESENTATIVE IS NOT SIGNED AND DATED, THE POWER OF ATTORNEY WILL BE RETURNED.**

Designation—Insert above letter (a–h)	Jurisdiction (state) or Enrollment Card No.	Signature	Date
a	TEXAS 00949000	[signature]	7/17/01